Daniels Cadillac, Inc. *and* Amalgamated Local Union 355. Case 4-CA-10817

7 March 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 20 April 1982 Administrative Law Judge Hubert E. Lott issued the attached Decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and Respondent filed a reply brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and hereby orders that the Respondent, Daniels Cadillac, Inc., Allentown, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] No exceptions were filed to the judge's findings that the Respondent committed violations of Sec. 8(a)(1).

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The General Counsel has also excepted, inter alia, to the failure of the judge to find that the Respondent's general manager, Falise, solicited a grievance from employee Dennis Friend, in violation of Sec. 8(a)(1) of the Act, as amended. We find it unnecessary to pass on this alleged violation of Sec. 8(a)(1), since it is essentially cumulative in the context of the other violations of Sec. 8(a)(1) found. Additionally, we find it unnecessary to reply on *Riley-Beaird, Inc.*, 253 NLRB 660 (1980), in agreeing with the judge that General Manager Falise's conversations with Glenn Koehler on 22 January and 6 February were violations of Sec. 8(a)(1) of the Act. Member Zimmerman would rely on *Riley-Beaird*.

We find it unnecessary to determine the appropriate unit or the Union's majority status or lack thereof because, in any case, we are of the view that the Respondent's unfair labor practices are of insufficient magnitude to warrant the issuance of a bargaining order.

DECISION

STATEMENT OF THE CASE

HUBERT E. LOTT, Administrative Law Judge. This case was heard at Allentown, Pennsylvania, on April 30 and May 1 and 19, 1981. The charge in this case was filed by Amalgamated Local Union 355 (the Union) on January 24, 1980.[1] A complaint based on the charge and alleging violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) by Daniels Cadillac, Inc. (the Respondent or Company) issued September 25. The complaint was amended at the hearing by the General Counsel to make the following changes.

1. Paragraph 2(b) was deleted and the following language was substituted.

"During the past year, in the course and conduct of its operations described above in paragraph 2(a), Respondent purchased and received goods valued in excess of $50,000 directly from points located outside the Commonwealth of Pennsylvania and Respondent's gross revenues from sales exceeded $50,000."

2. The language in paragraph 6(e) was deleted and the following language was substituted.

"On or about January 22, 1980, solicited employees to withdraw union authorization cards."

3. Paragraph 6(m) was added to the complaint and it reads as follows.

"On or about February 2, 1980, threatened an employee that if the Union represented the employees, the Respondent would discontinue the apprenticeship program in which the employees participated."

4. Added paragraph 6(n) to the complaint which reads as follows.

"On or about April 24, 1980, Respondent, through its agents coercively interrogated and interviewed its employees at Respondent's Allentown facility."[2]

5. Added paragraphs 7(a) and (b) to the complaint.

"(a) On or about January 23, 1980, Respondent, in a departure from past practice, paid its employees for attending a meeting. A purpose of the meeting was to afford the Respondent an opportunity to advise employees of Respondent's opposition to unionization.

"(b) Respondent engaged in the conduct described in sub-paragraph (a) above because its employees joined, supported, or assisted the Union, and engaged in concerted activities for the purpose of collective-bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such activities for the purpose of collective bargaining or other mutual aid or protection and to encourage employees to abandon their support for the Union."

6. Paragraph 7 of the original complaint was made paragraph 8 and all subsequent paragraphs up to and including paragraph 13 were increased by one number.

7. The following language was added as paragraph 15.

"By the acts and conduct described above in paragraph 7, Respondent has discriminated, and is discriminating, in regard to hire or tenure or terms or conditions of employment of its employees thereby discouraging membership in the labor organization, and Respondent thereby has been engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act."

8. Paragraph 14 of the original complaint was renumbered as paragraph 16.

[1] All dates herein refer to 1980 unless otherwise indicated.

[2] The date should be April 24, 1981.

The issues in this case are whether the Respondent engaged in various acts of interference, restraint, and coercion as alleged in the complaint to block the Union's organizational efforts. Also, at issue is whether a bargaining order is warranted under the principles enunciated in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

On the entire record including my observation of the demeanor of the witnesses and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a Delaware corporation, is engaged in the operation of an automobile dealership at its principal place of business in Allentown, Pennsylvania, where it annually purchases and receives goods valued in excess of $50,000 from points located outside the Commonwealth of Pennsylvania. The Respondent's annual gross revenues from sales exceed $500,000. The Company admits and I find that it is an employer engaging in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent further admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Alleged 8(a)(1) and (3) Violations*

1. January 16

a. *Evidence*

Donald Cole, body shop mechanic, testified that on January 16 Willard Jewel asked Cole to report to the Company's conference room which is located on the second floor in the office area of the Respondent's facility. Cole went to the conference room where he met with Jewel Gary Daniels and Richard Falise.[3] According to Cole, Jewel asked him if he knew anything about any union activity, whether he had signed a union card and if the Union had a majority. Cole stated yes to all of these questions. Jewel then stated that he knew the union activity had started in the body shop and that Cole was the ringleader. Cole denied being the ringleader. Jewel then asked Cole why he wanted a union since it was not going to get him any more than what he already had then. Cole then asked them if they would give the employees as much as they could get with the Union. The response was "more." Falise then stated that if the Union came in the employees would lose their personal benefits such as washing their own cars, working on their own cars, free title work, and the "company eating any come-backs."[4] Cole stated that the employees were not going to ask for anything that they did not deserve. Jewel asked Cole what he expected from management and Cole did not respond. Falise asked Cole if he had ever had any problems with management before. Cole stated that he had been asking for more money for over a year and had not gotten anywhere, that he was just getting put off. Finally Falise stated, "You know, you're going to break the old man's heart down in Florida, he really cares for you." This statement refers to the president of the Company, whose name is Jack or Daniel Daniels.

Donald Cole testified that, at a union meeting held that evening at the George Washington Motor Lodge, he told the union representatives and 17 employees what had happened at the conference with Falise, Jewel, and Daniels earlier that day.

Richard Falise testified that, on the date in question, he did have a meeting with Donald Cole, with Gary Daniels and Willard Jewel present, because he had heard rumors from outside sources that there was union activity at the Respondent's place of business. Falise testified that he did question Cole about the union activity in the Respondent's facility. Falise testified that he asked Donald Cole to the meeting because, in the past, he had been able to discuss various problems with him and that he thought Cole would be the logical person to discuss union activity with. Falise further testified that he asked Cole if there were any problems that he would like to discuss with them like he had done in the past. Cole stated that he had been talking about problems in the past but that nobody seemed to listen. Falise then asked Cole how far the union activity had progressed. Cole responded that he would be hearing about it very shortly. Falise then told Cole about some of the things that Respondent had done for its employees in the past, such as, donating money to Cole's brother when his apartment burned down. Falise went on to explain certain benefits that the Company offered that would not be included in a union contract such as allowing employees to wash their cars, repair their own cars on company premises, free title work and the company paying mechanics to work on "come-backs." Falise then stated that if the Company wanted to take away those benefits, they could but they were not going to conduct themselves in that manner, that the Company did not operate that way. Falise then told Cole that he had a right to join any organization that he wanted to, but by the same token, the Company had a right to defend themselves against that sort of action.

Gary Daniels, Willard Jewel, and Falise denied ever asking Cole whether he had signed a union card or whether the Union had a majority. They further denied that anyone stated that the union activity had started in the body shop and that Cole was the ringleader. They also denied saying that the employees would get more without a union or that the employees would lose their personal benefits if the Union came in.

[3] Richard Falise is the Respondent's general manager, controller and assistant to the president. Willard Jewel is the Respondent's service and parts manager, and Gary Daniels is the Respondent's vice president. All three individuals are admitted by the Respondent to be supervisors within the meaning of the Act.

[4] The term "eating any come-backs" refers to the Company's paying the the mechanic for work performed on a customer's automobile that was returned because it was incorrectly repaired initially.

b. *Analysis and conclusions*

The Respondent's witnesses admitted interrogating Donald Cole regarding his union activities and the union activities of other employees, and I so find. With respect to the second allegation in paragraph 5, Donald Cole testified that Respondent's witnesses, mainly Richard Falise, threatened to take personal benefits away from the employees if the Union came in. The mutually corroborative testimony of Jewel, Daniels, and Falise indicates that Cole was told that the Respondent could take those benefits away from the employees, but that they would not because they did not operate in that manner. After observing the demeanor of the witnesses, I find the mutually corroborative testimony of the Respondent's witnesses more credible than the uncorroborated statement of Donald Cole. Therefore, having credited the Respondent's witnesses I will dismiss the allegation in paragraph 5(b), but find a violation with respect to paragraph 5(a).

With respect to Donald Cole's allegation that he repeated the conversation between himself and Respondent's witnesses to 17 employees and the union representatives that evening at a union meeting, I find that this did not occur for the following reasons. As the General Counsel's witnesses were called to testify on other matters, they were asked about the Donald Cole conversation at the union meeting on January 16. Many of the General Counsel's witnesses testified that they did not recall any such statements being made by Donald Cole and the balance of the witnesses testified that Cole did not recount any conversation with the Respondent's witnesses held earlier that day. The only witness that remembered Donald Cole saying anything about the conference with the Respondent's witnesses earlier that day was Richard Cole, Donald Cole's brother. Richard Cole testified that he recalled his brother repeating a conversation held earlier with the Respondent's witnesses, before a few employees who were at the union meeting. Richard Cole's recollection was very poor and in my opinion unreliable. Therefore I find that other employees were not aware of the conversation between Donald Cole and the Respondent's witnesses which took place on January 16 based on the testimony given by all the witnesses relative to this incident.

2. January 17

a. *Evidence*

On January 17 union representatives Allan Settlow and Howard Klienberg went to the Respondent's facility. There, on the Cadillac service department floor they gathered together the 17 card signers who formed a semicircle around the union representatives and Falise, Jewel, and Gary Daniels. Settlow asked for recognition for the service department employees. Falise refused to grant recognition and instead requested that an election be held. Settlow stated that he represented the employees standing there and that, if Falise did not believe it, he should ask them. The employees then stated that the Union did represent them. Settlow wanted to have an election immediately, conducted by a third party; however, Falise would not agree to that and the union representatives left.

Paragraph 6(a) of the complaint alleges that Richard Falise solicited grievances from an employee on January 17. The only employee who testified concerning this allegation was William Lewers, one of the service advisors at the Respondent's dealership. At the hearing, Lewers testified that he could not remember any conversation with Falise on January 17. After reading his pretrial affidavit at the request of counsel for the General Counsel for the purpose of refreshing his recollection, Lewers still could not recall having any conversation with Falise on that day. Counsel for the General Counsel then offered Lewers' affidavit into evidence, as General Counsel's Exhibit 27. Lewers' affidavit reads in pertinent part, "I was at my work station at the desk, I think it was the same day as the assembly of everyone in the shop by Kleinberg, Falise asked me what my real beefs were. Falise said, that I had just gotten a raise and he thought I would be happy with it. I said I wasn't really. This was about it, it wasn't a very long discussion."

b. *Analysis and conclusions*

Lewers did not testify to the allegation in paragraph 6(a) of the complaint, even after reading his pretrial affidavit. I will not credit the uncorroborated allegation in his affidavit which was offered in lieu of what I consider to be the more reliable face-to-face testimony given under oath and subject to cross-examination. However, even if I had credited the Lewers statement, I would not find that Falise solicited a grievance from him since there was no express or implied promise to correct a grievance and ample evidence existed in the record that Respondent was not deviating from past practice. *Visador Co.*, 245 NLRB 508 (1979). Accordingly, I will dismiss the allegation contained in paragraph 6(a) of the amended complaint.

3. January 22 and February 6

a. *Evidence*

In support of allegation 6(b) the General Counsel offered the testimony of Dennis Friend, a mechanic in the Cadillac shop. Friend could not recall any conversation with Falise on January 22; however, after having refreshed his recollection by reading his pretrial affidavit, Friend did recall a conversation with Falise. He testified that Falise came by his work station and asked him if he had any problems. Friend told Falise that he had a problem about getting a day off after giving up a vacation day. Falise said he would check into it, that he did not know anything about it. Friend further testified that nothing was ever done about his problem. Friend further testified that, in the past, Falise had asked him if he had any problems; however, Friend never related any problems to him. Friend also testified that in the past Jewel frequently asked him similar questions and on one occasion he had related the vacation day problem to him.

In support of allegations 6(c), (d), (e), and (1) the General Counsel offered testimony of Glenn Koehler, an automobile painter. Koehler testified that about January

22 a mechanic told him that Falise wanted to see him in the parts department. When Koehler met with Falise in the parts department Falise asked him if he had any problems and Koehler responded by telling him that he never received the 20-cent-per-hour increase that Willard Jewel had promised him when he went to the paint shop. Koehler also told him that the exhaust fan needed repairing. According to Koehler, Falise said that he knew nothing about the wage increase and would have to check into it. However, if Koehler had money coming to him, he would get it whether the Union came in or not. Koehler further testified that Falise told him that he knew the Union was coming the next day and wanted to stop it. He further told Koehler that he had lunch with the union representatives and they were only asking for a 50-cent-per-hour increase. Falise said that he was willing to give a $1 an hour raise as soon as the Union was completely out and another $1 an hour the following year. He was also willing to give personal holidays and $250-a-week guarantee. Then Falise suggested that Koehler withdraw his union authorization card that night at the union meeting, which Koehler did. Koehler testified that at the union meeting that evening seven other employees withdrew their union cards after Ronald Kehs asked the union representative a question.

Koehler testified that 2 or 3 weeks later, Falise asked him to get his records together and he would see that he got the increase if he had it coming to him. Koehler collected his pay records and gave them to Falise. Subsequently, he received part of the increase that he had requested.

Russell Anspach, Cadillac parts assistant, testified that after he signed his union authorization card he was asked by Falise to withdraw it and the Company would offer him more money. Anspach said he would do it. He went to the union meeting and withdrew his union card.

Dennis Friend testified that he withdrew his union card because he did not believe the Union was telling the truth about paying employees wages if they went on strike or were discharged because of their union activities. He testified further that he was not solicited by Falise to withdraw his card but after discussing the matter with other people he changed his mind about signing the authorization card.

William Lewers testified that he withdrew his union card because he was upset with the way things were handled.

Timothy Groller, Cadillac apprentice, testified that he withdrew his union authorization card giving no reason for his action.

Wilbur Kunkle, Cadillac mechanic, testified that he withdrew his union card but he could not recollect when he did it nor did he testify as to why he took that action.

Ronald Kehs, Cadillac mechanic, testified that, at the time he signed his union card, the Union had told him that it would pay his wages if he went on strike or if he were discharged because of his union activities. Sometime thereafter, he asked Howard Kleinberg to put this guarantee in writing and give it to him at the next union meeting. He testified that he felt that he needed this guarantee because he had a family to support and that he needed his wages to accomplish this end. At the next union meeting, Kehs asked Kleinberg for the written guarantee that he would be paid by the Union in case he lost his job. Kleinberg did not have what Kehs requested, but instead asked him to call a certain phone number. Kehs stated that, when Kleinberg did not come forth with the requested guarantee, he withdrew his union card. Donald Cole, who apparently did not withdraw his authorization card, testified that, at the union meeting on January 22, Ronald Kehs asked Kleinberg a question. Kehs was not satisfied with the answer and requested that his card be returned to him. After that several other employees asked that their cards be returned to them.

Richard Falise testified that he had heard that Glenn Koehler was unhappy. He therefore met Koehler that afternoon in the parts department and asked him if he had a problem. Koehler responded that he was very upset because he had been promised a 20-cent-an-hour raise to be a painter and had only gotten the raise for a short period of time. When Koehler was hired in 1975, he was a combination metal man and painter. In 1979, Willard Jewel asked him to help out in the paint shop since they were short-handed. Since the other painters were making more money, Koehler stated that he would go to the paint shop if he got 20 cents per hour more. Jewel agreed to the increase up to the time that Koehler passed certain certification tests. In response to his complaint, Falise told Koehler that he had no way of verifying what he was saying since Jewel was in the hospital. However, he told him to get all of his time together and that he would receive his bonus or increase when Willard Jewel was released from the hospital and if he had indeed been promised the money. Falise testified further that Koehler mentioned something about a problem with an exhaust fan. According to Falise, he asked Koehler if he had any other problems and Koehler indicated that he was having a problem with Frank Reichl because Reichl was not assisting him in earning more money. Falise then told Koehler that he had had a meeting with the Union (Howard Kleinberg and Allan Settlow) and that they had told him that the Union was only asking for a 50-cent-per-hour increase per year for 3 years, but that the Company was planning on a $1-an-hour increase for that year. Falise further testified that the Company gave annual increases in March of each year since 1976. Falise denied telling Koehler that he wanted the Union stopped, and that he mentioned personal holidays or a $250 guarantee. He further denied mentioning any wage increase beyond the current year. According to Falise, at some point in the conversation, Koehler asked him what he could do to help and Falise responded by saying that he could help the dealership get out of this mess by withdrawing his authorization card. Falise testified that he knew better than to tell Koehler about the planned raise and that he should not have done it. He further testified that he never asked Anspach to withdraw his union authorization card.

b. *Analysis and conclusion*

The testimony of Dennis Friend in support of allegation 6(b) was not rebutted by the Respondent. However, I do not find that Falise's conduct constituted a solicita-

tion of a grievance since there was neither an implied or explicit promise to correct his problem. In my opinion, there needs to be more than a mere statement that he (Falise) would "check into it" when there were no other unfair labor practices committed against this employee who gave evidence that the Respondent solicited grievances from him prior to the union activity. Further, there was ample evidence provided in the record which will be discussed more fully below that the Respondent engaged in soliciting grievances as a normal practice prior to any union activity. Therefore, I will dismiss allegation 6(b).

After observing the demeanor of the witnesses and taking into account the Respondent's admissions, I find that Falise's conversation with Glenn Koehler on January 22 and February 6 constituted a solicitation of a grievance accompanied by an explicit promise to remedy the problem which was done in the context of committing other unfair labor practices and relating the inquiry to his union activity. *Riley-Beaird, Inc.*, 253 NLRB 660 (1980).

Falise promised a wage increase if the Union was defeated or withdrew and at the same time he solicited the withdrawal of Koehler's union authorization card. Even although the evidence indicates that the Respondent granted wage increases in March of every year, the inescapable conclusion seems to be that Falise promised a benefit in return for Koehler's "help." Thus, Respondent's defense is nullified in that respect.

I credit Anapach's version of what occurred with respect to his being solicited by Falise. Falise's demeanor on the stand when he offered a rather tenuous denial makes his testimony less believeable than that of Anspach. Therefore, the evidence supports the conclusion that Falise solicited the withdrawal of these employees' union authorization cards in the context of offering them benefits if they did so. This clearly is a violation of Section 8(a)(1) of the Act. *Aircraft Hydro-Forming, Inc.*, 221 NLRB 581 (1975); *Tunica Mfg. Co.*, 236 NLRB 907 (1978).

Although I find that Anspach and Koehler were coercively influenced to withdraw support for the Union, I cannot find that the other employees were influenced to withdraw their support for the same reason. The credible evidence in this record indicates that the employees withdrew their support on January 22. Therefore any unfair labor practices that may be found subsequent to that date would have no influence on their actions. The General Counsel offered no probative evidence that any employees were solicited by the Respondent. Moreover, the credible evidence indicates that the employees were influenced by the unrelated conversation between Kehs and the union representative wherein the employees perceived a lack of conviction on the part of the Union to protect them. Accordingly, I will not infer any causal relationship between the Respondent's action and that of the employees who apparently on their own decided to withdraw support for the Union.

Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraphs 6(c), (d), (e), and (1) of the amended complaint.

4. January 23

a. *Evidence*

On January 23, a meeting was held in the lunchroom for all employees. The Respondent called the meeting because Willard Jewel, its service and parts manager, had been hospitalized on January 20. The purpose of the meeting was to let everyone know to whom they could go with their problems while Jewel was in the hospital, as well as what the Company's position was going to be regarding the union organizational effort.

Falise opened the meeting at approximately 8 a.m. by reviewing with employees the progress which the dealership had made since moving into the new facility. He discussed various changes which he had made in shop operations in the past which made the employees' job easier. He also reviewed the benefits given in the past. Falise then handed out an organizational chart in order to advise employees to whom they could go to with problems while Jewel was in the hospital. He also told them that his door was always open and that he would listen to anyone who had a complaint. Falise also stated that no one would get fired as a result of his union activities. He told them that the Company intended to fight a clean, hard campaign and to abide by all the rules of the NLRB. At the end, a question was raised by an employee concerning the possibility of a raise and Falise responded that he could not answer that question at that time. When Falise opened the question-and-answer period, he stated that he would be willing to answer any questions that he could but that there would be many he would not be allowed to answer.

The Respondent admits paying the employees for attending this meeting but offered evidence that in the past it had paid employees when legitimate circumstances prevented them from working. Evidence was offered that Timothy Groller, a fireman, was paid for time that he spent away from the Respondent's facility engaged in volunteer firefighting or rescue work. Falise testified that employees are paid an average day's pay for time spent on jury duty. Employees are also paid for military leave. The Respondent also offered evidence that employees were paid an average day's wage on at least 2 days in the past when the dealership was closed because of snow. The Respondent's witnesses testified that Richard Cole was paid for time he took off when his apartment burned down.

The General Counsel's witness Ronald Bresnak, new-car get-ready man, testified that at this meeting Falise apologized for the last raise not being very large and stated that the Company planned to give employees another raise in February, but because of the union activity, it was not allowed to give it because it might be considered a bribe.

Donald Cole corroborated Falise's testimony when Falise stated at the meeting that he intended to conduct a clean campaign and abide by the NLRB rules and that no one would be fired. Cole further testified that, when the question of a raise came up, Falise responded by saying that it was just a rumor and that he could not promise anything right then because it might be consid-

ered a bribe. He stated that Falise told the employees that what they had done had awakened the Company and there were going to be a lot of changes. The Company had been involved in completing their new building and was not aware of the employees' problems. Cole testified that, prior to the advent of the union activity, service meetings were opened to complaints. He further testified that shop meetings held during the workday would still count toward the weekly guarantee.

Michael Dalton, another General Counsel witness, testified that Falise at this meeting stated that his eyes had been opened to problems and that there would be a lot of changes in the works. He confirmed that Falise stated that the Company would wage a clean campaign and that he could not discuss anything monetary at the time because of the Union's presence.

Timothy Groller, another General Counsel witness, testified that service meetings held prior to any union activity ended with questions from the employees concerning work-related problems and general gripes. At these meetings, company officials indicated that they would look into and resolve their problems.

Wilbur Kunkle, another General Counsel witness, testified that during the meeting on January 23 Falise asked if anyone had any questions. He further stated that there might be some questions he could not answer without checking with his attorney. Kunkle could not recall any statement made by Falise to the effect that a planned raise would not be put into effect because of the Union. Kunkle testified that service meetings generally ended with Falise asking if the employees had any gripes or problems. Depending on the problem, the Respondent would try to solve it or do something about it. Kunkle further testified that prior to the union activity Falise stated that he would listen to any employee problems and that his door was always open. According to Kunkle, Falise would say this at service meetings or when he was walking through the shop.

Ronald Kehs, a General Counsel witness, testified that Falise had stated at the meeting that the Respondent would be fair and operate within the law during the union campaign. Kehs testified that Falise, when asked a question about a raise, stated that he could not answer the question. Kehs testified that when Falise opened the meeting for questions he stated that he might not be able to answer all of the questions without consulting with his attorney. Kehs testified that at prior service meetings Falise and Jewel would open the meeting for questions and complaints and that these complaints were remedied insofar as Kehs was concerned.

Richard Cole and Daniel Kuhns, General Counsel witnesses, testified that they could not recall company meetings being held during the day. They were never paid for past service meetings because they occurred after hours. Kuhns testified that employees raised grievances at these service meetings and management would respond to them.

Wayne Kerstetter testified that he recalled some body shop meetings being held before the end of the workday and that he never lost any money because he attended.

Glenn Koehler testified that Falise told the employees at the January 23 meeting that he could not discuss a wage increase at that time, and that he would not be able to answer some questions without checking with his lawyer.

Testimony from other employee witnesses indicates that employee service meetings were almost always held after work hours, and were therefore not paid for by the Company.

b. *Analysis and conclusions*

The General Counsel alleges that the Respondent impliedly promised improved benefits to its employees at the January 23 meeting. I cannot agree that the General Counsel has proved by a preponderance of the evidence that the Respondent committed this violation. While there is some evidence that Falise stated that "things would get better," "there would be changes," or that "they would do their best to correct problems"; the General Counsel's witnesses also testified that Falise said he could make no promises and that he could not discuss a wage increase. In the face of the Respondent's denial that it impliedly or explictly promised its employees anything at this meeting, the conflicting testimony of the General Counsel's witnesses leads me to accept the Respondent's version of what was said. Therefore I will dismiss the General Counsel's allegation 6(f) of the amended complaint.

I am not convinced after hearing all the testimony in this record that the General Counsel has carried its burden of proof in establishing that the Respondent unlawfully solicited grievances at this meeting. Aside from the Respondent's denials, and testimony that it merely opened the meeting for questions, there is ample evidence in the record that the Respondent had solicited grievances in the past and acted on them. The General Counsel's witnesses further stated that Falise informed them that he could make no promises and when questioned about a most important matter (wage increases) refused to comment; thus, indicating to the employees that he could make no promises to correct anything. Further, the testimony indicates that, aside from the wage increase, no other grievance was raised by the employees. Thus, there was nothing for the Respondent to act on (by way of a remedy) either explicitly or impliedly. *Visador Co.*, supra; *Uarco Inc.*, 216 NLRB 1 (1974). Accordingly, I will dismiss allegation 6(g) of the amended complaint.

Allegation 6(h) needs very little comment because it is clearly contradicted by the General Counsel's witnesses. Ronald Bresnak testified in support of this allegation; however, several of the General Counsel's witnesses not only contradicted him, but also supported Falise's version of what was said. Therefore, I discredit Bresnak and dismiss allegation 6(h) of the amended complaint.

With respect to allegations 7(a) and (b) of the amended complaint, the Respondent admits paying those employees who attended the meeting. The record evidence is clear that in the past the Respondent did not pay for service meetings because they were held after work hours. However, employees who attended other meetings held on worktime lost no wages. There was also considerable evidence in the record that the Respondent

in the past paid for employees' time lost during the working hours which was due to circumstances beyond their control. The Respondent argues that the General Counsel failed to carry its burden of proof that the Respondent failed to pay employees for attending meetings. *Sports Pal, Inc.*, 214 NLRB 917 (1974), and *Golub Corp.*, 159 NLRB 355 (1966). The General Counsel argues that past meetings were not paid for and since attendance was required as a condition for receiving payment anyone who exercised his statutory right not to attend would not have been paid for the length of the meeting. The General Counsel further argues that the payments were unlawful not only because they were a reward for participating in an activity combating a union, but also because other employees who might have refused to participate in it were denied payments. *Keystone Pretzel Bakery*, 242 NLRB 502 (1979).

I cannot agree with the General Counsel's argument because it is not supported by a preponderance of the evidence. The General Counsel proved that in the past the Respondent conducted most of its meetings on nonwork time which were therefore not paid for. However, there is evidence in the record that meetings and other activities which took employees away from their work were paid for by the Respondent. Furthermore, there is no evidence in the record that the January 23 meeting was mandatory. The General Counsel's two leading witnesses testified that most of the service employees attended (D. Cole) and that some of the employees were there (Bresnak). Coupled with this factor, the General Counsel failed to prove that those employees who did not attend the meeting were not paid. Moreover, judging from the comments made at the meeting, it can hardly be said that the purpose of the meeting was to provide a forum for the Respondent's antiunion campaign.

Accordingly, I will dismiss allegations 7(a) and (b) of the amended complaint.

5. January 28

a. *Evidence*

In support of allegation 6(i), the General Counsel presented one witness, Daniel Kuhns, Cadillac mechanic, who testified that sometime around the end of January or the first of February Falise approached him at his work station in the shop and said that he was conducting a survey of employees' gripes and wanted to know whether Kuhns had any complaints. He told Falise that the mechanics' weekly guarantee was not enough money and that Paul Mackes who had worked 38 years for the Respondent was not earning enough money. According to Kuhns, Falise after hearing what he had to say merely walked away. Kuhns testified that, in the past, employees registered grievances at company-sponsored service meetings. He stated that management would sometimes respond to employee questions and grievances and at other times they would not. He further testified that he did not remember Falise ever asking if he had any problems in the past. He did, however, remember taking his grievances to Willard Jewel in the past.

Richard Falise testified that he never told Kuhns that he was conducting a survey nor did he use the word "survey" to any employees. He further testified the only time "survey" came up was when he was conducting wage surveys among the other employers in the area to find out whether the Respondent's wages were in line with theirs. Falise further testified that periodically he would stop by Kuhns' work station and ask him if he had any problems and this occurred prior to any union activities. At one point in time, Kuhns complained that his wife was not on the Company's medical plan because she was covered by another employer. Falise told Kuhns that if he wished he would have the records corrected so that she was covered by the Respondent's medical plan, which he did. On another occasion prior to the union activities, Kuhns complained that he was getting all the "crappy" jobs and could therefore not make any money. Falise agreed to mention the problem to Willard Jewel. Falise finally testified that prior to the union activity he was in the habit of talking to employees in the shop and asking them if they had any problems; however, this activity picked up somewhat after January 20, when Willard Jewel was hospitalized. Jewel's hospitalization required Falise to assume some of Jewel's duties.

Willard Jewel testified that prior to the union activity he talked to employees every day in the shop and asked them if they had any problems.

Several General Counsel witnesses (Friend, Groller, Kunkle, and Kehs) testified variously that prior to the union activity Falise and/or Jewel came to them regularly in the shop and asked them if they had any problems or complaints.

b. *Analysis and conclusions*

The evidence is clear that on January 28 Falise asked Daniel Kuhns if he had any complaints. Kuhns stated his complaints to Falise who walked away without responding. This is not denied by Falise. However, the alleged statement having to do with "survey" was denied by Falise and I credit Falise's denial because this statement was elicited through leading questions posed by the General Counsel, and there was no other reference to a "survey" in this record other than Kuhns' testimony. Moreover, on this point, Falise appeared to be the more credible witness.

After reviewing all the evidence on this issue, including the testimony of the General Counsel's own witnesses, it is apparent that the Respondent had a past practice of soliciting grievances. Under these circumstances, where neither an implied nor expressed promise was made to Kuhns to remedy his grievances, I cannot find that the Respondent violated Section 8(a)(1) of the Act. *Visador Co.*, supra. Accordingly, I will dismiss allegation 8(i) of the amended complaint.

6. February 2

a. *Evidence*

In support of allegations 6(j), (k), and (m), the General Counsel produced Wayne Kerstetter, body shop apprentice, who testified that he was presently in the Respondent's apprenticeship program which called for a 50-cent-per-hour wage increase every 6 months. Kerstetter testi-

fied that on February 2 Falise came to his workplace and asked him what his main gripe was. Kerstetter said money. Falise told them that he had set up the apprenticeship program where apprentices were currently receiving a 50-cent-an-hour increase every 6 months. Falise then told him that if the Union got in the Company would only give an increase of 50 cents per hour per year. Falise then asked him to figure out what he would get with the Union and without the Union. Kerstetter replied that he would receive $3-an-hour increase without the Union and $1.50-an-hour increase with the Union. According to Kerstetter, Falise asked him to think about it. On re-direct examination, after having his recollection refreshed by reading his pretrial affidavit, and in reply to a leading question by the General Counsel, Kerstetter testified that Falise also told him that if the Union came in the Company would discontinue the apprenticeship program. Prior to that, on cross-examination, Kerstetter testified that Falise did not tell him that he would abolish the apprenticeship program.

Richard Falise denied ever telling Kerstetter that he intended to abolish the apprenticeship program. However, he did admit having a conversation with Kerstetter on approximately February 2. At that time Falise told Kerstetter that he had had lunch with the union representatives and that they told him they only wanted a 50-cent-a-year increase because they were only trying to get into the Allentown area. Falise then told Kerstetter that under the apprenticeship program he was currently guaranteed a $1-a-year increase. Then he asked Kerstetter what he would be earning in 3 years with the Union and without a union. Kerstetter replied that he would be paid $3 without a union and $1.50 an hour with a union. Falise then told him that he should think about these things independently before making up his mind.

b. *Analysis and conclusions*

After hearing both versions of the conversation and observing the witnesses' demeanor while testifying, I credit Falise's version of what was said with the exception of the question asked by Falise as to what Kerstetter's main gripe was, which was not denied. Furthermore, I find that the Respondent had an established apprenticeship program which called for a wage increase of 50 cents per hour every 6 months. I also find, since it was never rebutted by the Union, that Falise did meet with union officials who offered to settle for a 50-cent-per-hour wage increase per year over a 3-year period in return for a contract to enable them to establish themselves in the Allentown area.

Based on these findings, I conclude that Falise did not solicit a grievance from Kerstetter. This is based partially on my findings and conclusions set forth above in the prior numbered paragraphs and on my findings herein that when Kerstetter told Falise that his main complaint was money Falise in essence told him that he was earning enough money in the apprenticeship program; thus, specifically, negating any inference of a promise of benefit. *Uarco Inc.*, supra. Accordingly, I will dismiss allegation 6(j) of the complaint.

With respect to allegation 6(k), I can find no implied promise of improved benefits when the Respondent merely tells an employee what his existing benefits are, and compares them with what the Union is offering. Accordingly, this allegation will also be dismissed.

Allegation 6(m) has no merit because I have discredited the testimony in support of it. Kerstetter's testimony was conflicting, contradictory, uncorroborated, completely isolated in the context of this case, and elicited through leading questions. Accordingly, I will dismiss allegation 6(m) of the amended complaint.

7. April 24, 1981

a. *Evidence*

In support of allegation 6(n) the General Counsel offered two witnesses, Donald Cole and Glenn Koehler. These witnesses were interviewed by the Respondent's attorney on April 24, 1981, in preparation for the trial of this case. The parties agree that prior to the interview Respondent's attorney read the following language to both witnesses:

> The Company is attempting to secure information necessary to its defense in a case before the National Labor Relations Board. This interview has no other purpose and I will only ask questions relevant to the case. I will not ask you for and you should not volunteer any information concerning your personal feelings or your activities with respect to the Union. Your cooperation is voluntary and you are free to answer or not answer my questions. You will not be rewarded for your cooperation nor will there be any adverse consequences if you exercise your right to refuse to assist me. You may terminate this interview at any time.

The meeting with the two employees took place in the conference room near management offices on the second floor of the Respondent's facility. Present were the Respondent's attorney Richard Falise and Glenn Koehler. After Koehler was interviewed, Donald Cole was called in and interviewed. Koehler testified that he was asked about the conversation he had with Falise in January. Koehler told them that Falise had said that he would receive a $1-an-hour raise and $1 an hour the following year plus guaranteed raise and personal holidays. Questioning by counsel for the General Counsel of Koehler follows:

> Q. Did Mr. Falise say anything?
>
> A. He like disagreed with me about the $1-an-hour raise the following year, he disagreed with that.
>
> Q. Can you tell us what he said, to the best of your recollection?
>
> A. I can't really remember.
>
> Q. You can't remember word-for-word?
>
> A. No.
>
> Q. Can you tell us the gist of what he said?
>
> A. No. He did say about personal holidays and guarantee up to $250. He did say he didn't get that. That that $1-an-hour raise after the first year, the second year, he disagreed with that, that he didn't

say that or he said, I don't remember saying that, not so sure as far as that $1-an-hour the second year.

JUDGE LOTT: Was your Union card brought up?

WITNESS: At that meeting?

JUDGE LOTT: Yes.

WITNESS: I don't recall that, I don't remember.

Donald Cole testified to the General Counsel's questions as follows:

Q. Were you asked about the meetings you attended with Mr. Jewel, Mr. Falise, and Gary Daniels?

A. Yes.

Q. Did Mr. Falise say anything to you during the course of the meeting?

A. I had explained what happened, what I recalled had happened at the meeting and I told them that Falise said they were going to take away all of these benefits if the Union got in and Mr. Falise said, he said they could take them away, but they were not going to, and I said I don't recall him saying that at that meeting.

Q. You mean Mr. Falise said what he had said back then was we could take them away, not that they would take them away.

A. Yes.

JUDGE LOTT: Did he say anything else? Did he say anything else?

WITNESS: I said a couple of things about that meeting.

JUDGE LOTT: This was the one on the 16th with Falise, Jewel and Daniels?

WITNESS: Yes, we spoke about that meeting and they asked me some questions about the lunchroom meeting after certain employees removed their cards.

JUDGE LOTT: Go ahead.

Q. Do you recall anything else that was said by Mr. Falise?

A. I don't recall exactly what was all said. He just asked me certain questions about my activities and I answered them.

Q. Did Mr. Falise say anything else other than what you have already told us?

A. I talked directly to Falise about what had happened during that period of time, how things got started and why I felt the way I did, what my complaints were, why I did what I did.

Q. Did you volunteer the information, or did Mr. Falise ask you?

A. I volunteered.

b. *Analysis and conclusions*

The General Counsel limits his allegation to three factors in urging that an 8(a)(1) violation be found in the *Johnny's Poultry* interrogation.[5] He contends that the place of the interview was coercive because the interviews were conducted at a situs not normally visited by service and parts employees and at the same location where prior unfair labor practices had been committed. The General Counsel further argues that the interviews went beyond the bounds of privileged pretrial preparation because Richard Falise was present and disagreed with some of the witnesses' statements.

In the *Johnny's Poultry Co.* case, the Board set forth its policy of permitting employers to conduct employee interviews in order to ascertain facts necessary for the preparation of its defense against charges issued. In that case, the following safeguards are set forth:

1. The employer must communicate to the employee the purpose of the questioning.

2. Assure the employee that no reprisals will take place.

3. Obtain employee participation on a voluntary basis.

4. The questioning must occur in a context free from employer hostility to union organization.

5. The questioning must not itself be coercive in nature.

6. The questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of the employees.

"When an employer transgresses the boundaries of these safeguards, he loses the benefits of the privilege." *Johnny's Poultry*, supra.

After reviewing a testimony in this case, the only issue is whether or not the Respondent violated requirements 4 and 5 of the *Johnny's Poultry* safeguards, since the Respondent gave the employees the required assurances listed in the first three safeguards. I also find that only pertinent questions were asked of the witnesses. I further find that, although the conference room was used, there was no evidence offered by the General Counsel that an alternative, private place was available. Although Falise was present during the interviews, I do not view this as a violation in the context of this case, since there had been a cessation of unfair labor practices for over a year. This factor also weakens the General Counsel's argument with respect to the location of the interviews. Furthermore, I cannot find anything coercive in what Falise said, since I view his comments as an attempt to refresh his own recollection as well as that of the witnesses. *Lammert Industries*, 229 NLRB 895 (1977). The evidence further supports the conclusion that the interviews were completely free of employer hostility to union organization. In fact, according to the General Counsel's witnesses, the Union was hardly mentioned and then only in relation to legitimate questions put to the witnesses.

Based on my findings and conclusions, I cannot find that the Respondent exceeded the bounds of legitimate pretrial preparation and I will therefore dismiss allegation 6(n) of the amended complaint.

[5] *Johnny's Poultry Co.*, 146 NLRB 770 (1964).

B. *The Alleged 8(a)(5) Violation*

1. The appropriate bargaining unit

a. *Stipulated unit*

The parties stipulated that the unit appropriate for collective-bargaining purposes is as follows:

> All service and parts department employees employed at the employer's Allentown, Pennsylvania automobile dealership facility, excluding office clerical employees, car salesmen, guards and supervisors as defined in the Act.

The parties further stipulated that 24 employees are included in the unit.[6]

The agreed-on employee inclusions occupied the following job classifications on January 17: Cadillac parts assistant, new-car get-ready employees, body shop mechanics, Cadillac mechanics, used-car get-ready employees, Cadillac apprentices, warranty clerk, service cashier, body shop apprentices, Cadillac service advisor, BMW mechanics, and body shop helper. The parties disagree on the unit placement of 21 employees. The General Counsel contends the unit should consist of 24 employees while the Respondent contends the unit should have 45 employees.

b. *General unit information*

The Respondent's dealership facility is housed in a new main building which was in the process of being completed in January. This building has two floors and a basement. The second floor has executive offices, clerical offices, and a conference room. The first floor contains a showroom which is separated from the parts and Cadillac service department by a wall. The basement contains the BMW service and parts department. A body and paint shop is housed in a separate building located approximately 10 feet from the main building and parallel to the BMW service and parts department.

The Respondent contends that the only supervisors at its facility are Jack or Daniel Daniels, president; Gary Daniels, vice president; and Richard Falise, assistant to the president, controller, and general manager. The Respondent further contends that Willard Jewel, service and parts manager, is a supervisor and was responsible for the overall supervision of the service and parts department employees.

The Respondent offered credible evidence that various employees were given the title "manager" or "foreman" because the Cadillac and BMW factory management insisted that these titles be used.

The Respondent offered credible evidence that an organization chart was issued to its employees on January 23 because Willard Jewel was hospitalized on January 20 and it wanted to inform its employees who they should report to in the absence of Jewel. No evidence was offered that a demand was made after January 23. Furthermore, no evidence was offered that the reporting procedure designated on the organization chart was in existence prior to the demand made by the Union on January 17. Therefore, I have accorded little weight to the contents of the chart in deciding supervisory status of various employees.

c. *Status of car porters*

There are four car porters at issue in this case: Theodore Hester, John Manwiller, Karen (Grace) Manwiller, and Robert Reed. The General Counsel contends that the car porters are casual employees who lack a community of interest with the other unit employees. The Respondent contends that the car porters are regular part-time employees having a community of interest with the other service and parts employees. The car porters are employed on an as-needed basis. They are called to work from a list of names and numbers. Their job duties consist of picking up and delivering cars for customers and for the dealership. They also gas cars and do other errands for the service and parts director who they report to. They are paid according to each trip by separate checks drawn from a payroll expense account and are not carried on the Respondent's regular payroll account. The porters are eligible for employee discounts on purchases of parts, repair to cars, and purchases of new or used vehicles; however, they do not share other employee benefits such as health insurance. Their names are not on the Respondent's payroll records, no taxes are withheld for them, and no W-2 forms are issued to them. They are covered by a blanket workmen's compensation insurance policy as are other employees of the Respondent. The porters are retired people who apparently work no other place. Although most of their time is spent driving cars, they spend approximately 5 percent of their time at the Employer's facility waiting for work.

The work records of the above employees were examined and disclosed that in 1979 John Manwiller worked 36 hours and made 6 trips in January; worked 17 hours and made 3 trips in February; worked 52 hours and made 9 trips in March; worked 54 hours and made 9 trips in April; worked 16 hours and made 4 trips in May; worked 38 hours and made 6 trips in June; worked 21 hours and made 5 trips in July; worked 62 hours and made 11 trips in August; worked 38 hours and made 7 trips in September; worked 35 hours and made 4 trips in October; worked 28 hours and made 3 trips in November; and worked 8 hours and made 2 trips in December. During the first part of 1980, Manwiller worked 34 hours and made six trips in January; worked 4 hours and

[6] At the hearing the General Counsel took the position that Richard Falise Jr., Cadillac apprentice, should be excluded from the unit because of the relationship between him and Richard T. Falise. However, in his brief, the General Counsel concedes that Richard Falise Jr. should be included in the unit. The evidence shows that Richard Falise Jr. is the son of Richard T. Falise. He is an apprentice mechanic and is compensated at the same rate as the other apprentices and receives no special consideration or privileges. He performs the same type work as the other apprentices. Falise's father, Richard T. Falise, is employed by the dealership as assistant to the president. Falise also functions as the general manager, secretary-treasurer, and controller. However, he owns no stock in the Company and receives only a weekly salary. Under these circumstances, and because the parties agree to the inclusion of Richard Falise Jr., I find that Richard Falise Jr. should be included in the unit.

made one trip in February; and worked 25 hours and made five trips in March.

Robert Reed's work record revealed that in 1979 he worked 27 hours and made five trips in March; worked 41 hours and made seven trips in April; worked 12 hours and made two trips in May; worked 2 hours and made one trip in June; worked 6 hours and made one trip in July; worked 29 hours and made seven trips in August; worked 24 hours and made four trips in September; worked 30 hours and made three trips in October; and worked 4 hours and made one trip in November. During the first part of 1980, Reed worked 10 hours and made two trips in January, and worked 10 hours and made one trip in February.

The work record of Theodore Hester revealed in 1979 he worked 27 hours and made four trips in April; worked 18 hours and made three trips in June; worked 6 hours and made one trip in September; worked 7 hours and made one trip in October; and worked 9 hours and made two trips in November. During the first part of 1980, Hester worked 12 hours and made one trip in February, and worked 12 hours and made two trips in March.

The work record of Grace Manwiller for the year 1979 revealed that she worked 4 hours and made one trip in April; worked 11 hours and made two trips in June; worked 7 hours and made one trip in July; worked 12 hours and made two trips in September; and worked 7 hours and made one trip in October. During the first part of 1980 she worked 4 hours and made one trip in January, and worked 4 hours and made one trip in March.

The evidence reveals that, with the exception of John Manwiller, the other car porters work sporadically and infrequently. For example, Reed worked a total of 24 hours on four trips from November 1979 through February 1980. Hester worked a total of 21 hours on three trips for the same period, and Grace Manwiller worked 4 hours on one trip during that period. They were on-call employees having infrequent and irregular work schedules. Therefore, I find that with the exception of John Manwiller, the other three car porters were casual or irregular part-time employees who should be excluded from the unit. *Maietta Contracting*, 251 NLRB 177 (1980).

I further find that all four car porters lack a community of interest with the service and parts employees. They are paid differently and earn only $3.25 per hour, which is considerably less than most of the other unit employees. They are retired people who supplement their income with the work Respondent assigns them. The Respondent conceded that the porters spend only 5 percent of their time at the dealership facility; however, even this figure is misleading since that 5 percent represents only a percentage of time they are called to work, which is infrequent. A review of their records indicates that they spend virtually all of their time, when called to work, on the road delivering or picking up dealership automobiles from such places as Philadelphia and Harrisburg, Pennsylvania, New York, New Jersey, and Connecticut. Thus, the records indicate that the porters spend very little, if any, time delivering customer automobiles, waiting at the Respondent's premises, or performing work similar to that of service and parts department employees. For the above reasons, I conclude that the car porters lack a community of interest with the other unit employees and should be excluded from the stipulated unit.

d. *Status of janitors*

The dealership employs eight janitors at its facility on a regular part-time basis: Ruth Lorkowski, Stanley Lorkowski, Joan Lorkowski, Robert Lorkowski, Mervin Peters, Nelli Chinchilla, Marie Hunsicker, and William Hunsicker. The General Counsel contends that the janitors are independent contractors having no community of interest with the other unit employees, while the Respondent contends that the janitors are employees having a sufficient community of interest with the other unit employees to be included in the stipulated unit.

In 1977 when the janitorial service was first established, Falise met with Ruth Lorkowski and explained to her what services he wanted performed weekly. That is, clean the service departments, empty the trash, wash windows, and clean the restrooms. Lorkowski decided how many janitors she would have to hire and she and Falise decided on how much money she would need weekly to accomplish these tasks. It was also decided that "extras" would require payment of money above the weekly amount established for the regular duties. These "extras" included washing the windows more than once per week and shampooing rugs which basically would be accomplished on Saturday and Sunday. For regular work, the Respondent issues a weekly check for a fixed amount of money to Ruth Lorkowski, and she in turn pays the other janitors. Hours of work were established at this time and are 7 to 10 a.m. and 5:30 to approximately 10 p.m. Service and parts employees work from 8 a.m. to 5:30 p.m. In the morning the janitors clean the bathrooms and the lunchroom areas where the service department employees are unlikely to be except for occasional use of the lavoratory or a trip to the lunchroom for coffee. They do not clean the shop areas until after 5:30 p.m. when service and parts department employees have left for the day.

Ruth and Stanley Lorkowski work 35 hours in 5 days per week. Joan Lorkowski works 15 to 20 hours in 3 days per week. Nelli Chinchilla, Robert Lorkowski, and William Hunsicker work 15 to 20 hours in 2 or 3 days per week and Marie Hunsicker works 10 to 15 hours per week.

Ruth Lorkowski reports to Willard Jewel or Richard Falise on a regular basis to find out whether or not janitorial services are adequate. At that time, Jewel or Falise inform her as to whether the services or work was adequately performed and give specific instructions as to what they want accomplished that week. Ruth Lorkowski in turn instructs the other janitors based on her conversation with Falise and Jewel. At times however, Falise and Jewel instruct the janitors individually on what needs to be accomplished such as putting toilet tissue in the restrooms, filling soap dispensers, emptying trash, and changing light bulbs. The dealership provides the cleaning supplies and equipment used by the janitors.

Although there is a set amount paid to Ruth Lorkowski by the dealership for the cleaning that must be done on a daily basis in the shop, an extra amount is paid for those jobs not done on a daily basis.

Ruth Lorkowski has the authority and does in fact hire and fire the janitors and directs their work. The Respondent, however, reserves the right to approve or reject any janitor hired by her.

The janitors do not appear on the Respondent's payroll records, no checks are issued to them individually, no taxes are withheld for them, and no W-2 tax forms are prepared for them. They do not receive other employee benefits such as health insurance, life insurance, and disability. With the exception of Ruth and Stanley Lorkowski, they do not receive discounts on repairs and reduced prices for the purchase of used cars. All janitors are covered by the Respondent's workmen's compensation plan. Three janitors, Ruth Lorkowski, Stanley Lorkowski, and Joan Lorkowski, worked specific hours established by the Respondent. Janitors share the same lunchroom and restrooms as the other employees working for the Respondent.

After reviewing all of the evidence and the criterion established for finding that an independent contractor rather than an employee relationship exists under *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968), and *Standard Oil Co.*, 230 NLRB 967 (1977), I conclude that the janitors are employees because they meet virtually none of the standards established to qualify for independent contractor status. It appears obvious that the janitors performed functions which are an essential part of the Company's operation. They work exclusively for the Respondent and this arrangement apparently will continue so long as they perform their work satisfactorily. It appears further that any arrangement made between the Respondent and Ruth Lorkowski could be changed unilaterally by the Respondent and was in fact changed in April when janitorial services were cut back in an economy move. Finally, the evidence is also clear that the Respondent has retained control not only over the ends to be achieved, but also the means to be used in achieving such ends. *George Transfer Co.*, 208 NLRB 494 (1974). Accordingly, I find that the janitors are employees and do not have the status of independent contractors.

Community of interest shared by the janitors and the service and parts department employees is not as close as other contested employees who perform unit work. However, these factors emerge. The janitors perform a vital function which is essential to the Company's normal operation. They work in the same areas and share the same facilities as other unit employees. They also perform some work when the service and parts employees are still working. Moreover, they have the same ultimate supervision as the other unit employees. For the above reasons and since no other union is seeking to represent them separately, I conclude that the janitors, with the exception of Ruth Lorkowski, should be included in the unit. *Beyerl Chevrolet*, 199 NLRB 120 (1972); *Dadco Fashions*, 243 NLRB 1193 (1979).

The evidence supports a finding that Ruth Lorkowski is a supervisor within the meaning of the Act, because she hires and discharges janitors and responsibly directs their work. Accordingly, I find that Ruth Lorkowski should be excluded from the unit.

e. *Service clerks and telephone operator*

The General Counsel contends that Fern Hoch and Victoria Rackus, service clerks, and June Walters, telephone operator, are office clerical employees and should be excluded from the unit. The Respondent contends that these employees are plant clericals with a sufficient community of interest with the unit employees to be included in the stipulated unit.

Victoria Rackus and Fern Hock work on the second floor of the Respondent's facility where they are located in a general office area near the executive offices and the conference room. They work with Cindy Davis, miscellaneous administration, and Kathy Krupka, title and billing clerk. All of these employees have desks and separate restrooms on the second floor. On the telephone list circulated by the Respondent in January, these four employees were listed under the word "office" along with Daniels and Falise. Their titles are as follows: Fern Hoch, accounts payable and receivable, Vicky Rackus, leasing, Kathy Krupka, title clerk, Cindy Davis (nothing listed), and June Walters, operator. Hoch, Rackus, and Walters are hourly paid, do not punch a clock, and are supervised by Falise.

Fern Hoch's duties consist of auditing the cashiers every morning in order to see that the amount of money turned in for the repair orders is correct, making sure that all charge slips or service work had been prepared accurately, and submittting all charge slips for payment. She also maintains all of the accounts receivable work for the shop. In the event that a customer's account shows an error, she corrects it. She also pays all invoices for parts purchased by the dealership, making sure that the purchase orders are attached. She buys all of the savings bonds for the service department employees and delivers them directly to the mechanics. Hoch also files all copies of the service department repair orders and arranges for transportation of the mechanics to school. She processes all internal repair orders, which sometimes involves the transfer of equipment from one car to another. She also processes all customer repair orders by double checking the paperwork. According to the Respondent, Hoch spends approximately 50 percent of her time doing service department-related work and 50 percent of her time doing administrative work. Also, according to the Respondent, Hoch spends 90 percent of her time in the office area and approximately 10 percent of her time elsewhere in the shop, talking to service department employees.

Victoria Rackus has a desk on the second floor with a telephone and spends her time between the general office area and the computer room. Rackus programs service work on customer automobiles into the computer. This allows the service advisor to check the computer by merely punching in the serial number and mileage on a customer automobile. The computer then prints out the history of all the work which has been done on the automobile as well as recommendations for service needed when the customer arrives. Rackus spends approximately

50 percent of her time doing work related to the service and parts department. She also checks employees' timecards to see that they are paid properly. If an employee has not punched out correctly, she goes into the shop to talk to the mechanic or to Willard Jewel. At times, the mechanics also go to Rackus in order to find out about any discrepancies in their pay. She must then look over the repair orders to determine the correct amount. Rackus also maintains a weekly analysis by service advisor and mechanic on how much labor is sold per ticket, and how many parts are being sold per ticket per mechanic, per service advisor. This is done in order that the dealership may determine how the computer has increased its customer service business. Rackus also maintains a list of service customers and their frequency of visits. She oftentimes prints a listing of customers who have not been in for 6 months or more so that the service advisors can call them to suggest a checkup. While the Respondent's witness testified that Rackus spends approximately 10 percent of her time in the shop and 90 percent of her time in the office area, Donald Cole and Michael Dalton testified that she comes to the shop area approximately two times a year.

June Walters, whose job was eliminated in an economy move, was the telephone operator who was located in the center of the showroom floor which is separated from the service department by a wall which extends the full length of the building. Walters was trained by the telephone company and her main duties consisted of answering the telephone and transferring calls to the appropriate individuals in the Company. She also accompanied customers to the service area showing them where the area is located and she also served coffee to customers in the customer waiting room which is located between the showroom and the service department. Like Rackus and Hoch, Walters was paid on an hourly basis and received the same benefits as the service and parts department employees.

The record evidence indicates that Hoch and Rackus work in a traditional office area with other office clerical employees who are not included in the unit, and spend very little time in contact with service department employees. I am not convinced that 10 percent of their time is spent in the shop areas and, for this reason, I discredit Falise's testimony in this respect. In contrast, it appears that Hoch and Rackus spend nearly all of their time working with office clerical employees located in the general office area on the second floor which is removed and isolated from the service and parts department areas. Moreover, as a group, the clerical employees are supervised by Falise while the other unit employees are supervised by Jewel. Finally, their job duties seemed to be of a typical office clerical nature.

June Walters had very little if any contact with unit employees. Her only contact appears to be by telephone with management personnel. I find that Walters did not actually go into the service department, but merely escorted customers to the door leading to that area.

Accordingly, I find that while all three employees share the same benefits with service employees, they have completely different job duties and supervision. They are physically separated from the service employees and have minimal contact with them. Therefore, I will exclude Hoch, Rackus, and Walters from the unit because they are office clerical employees lacking a community of interest with the service and parts department employees.

f. *Used-Car get-ready (Clark Peters)*

The General Counsel contends that Clark Peters is a supervisor and should be excluded from the unit, while the Respondent contends that Peters is an employee and should be included in the unit.

Clark Peters is employed as one of the used-car get-ready employees and has a helper named Richard Goebert. Peters spends almost all of his time refurbishing used cars. He is paid a salary and has worked for the dealership for approximately 30 years. Peters reports to the used car manager who instructs him in what cars to work on and what to do. Peters in turn passes these instructions on to his helper Richard Goebert. Ron Bresnak, new-car get-ready employee, also has a helper named Alexander Dick and has the same authority over Dick as Peters has over Goebert. Ron Bresnak who reports to the new-car sales manager and Clark Peters often work together preparing cars for sale. Peters earned $16,490 in 1980 while Richard Goebert earned $8,041 and Alexander Dick earned $6,775. There is no record of the earnings of Bresnak. These last three employees, however, are hourly paid while Peters earns a salary.

Peters has no authority to hire or fire and has not exercised this authority in the past. He has no authority to recommend hiring and firing or to discipline employees. He cannot adjust grievances and if his helper has a problem or grievance he takes it to either Willard Jewel or the used-car sales manager. Peters wears a white shirt while the other three employees wear shirts that are colored.

The evidence indicates that Peters has no indicia of supervisory authority. I find that he spends nearly all of his time performing unit work and, at most, he gives routine directions to his helper in the same way that the mechanics do with their helpers and apprentices. While he is on salary and paid twice as much as helpers, these factors could be attributed to his long service with the dealership. I find that his status is nearly identical with Ronald Bresnak's who is included in the unit by agreement of the parties. Accordingly, I find that Clark Peters is not a supervisor and should be included in the unit.

g. *Cadillac shop foreman (Robert Ettl)*

The General Counsel contends that Robert Ettl is a supervisor and should be excluded from the unit, while the Respondent contends that Ettl is a technical lead mechanic and should be included in the unit.

At the time material herein, Robert Ettl was designated as the "shop foreman" for Cadillac factory records; however, he was actually a technical lead mechanic according to the Respondent. Ettl is the best mechanic the dealership has because he has the most experience and had attended all of the Cadillac schools. He has been employed at the dealership for approximately 30 years. The

dealership relies on his technical ability to help other mechanics in the proper diagnosis and repair of vehicles.

According to the Respondent's witnesses, Ettl keeps his tools in the shop and spends 80 percent of his time diagnosing vehicle problems, and repairing and road-testing vehicles. The other 20 percent of his time is spent writing up repair operations, warranty work, and coding them. In accomplishing these tasks, Ettl has the authority to assign work (job orders) to the mechanics the same as the service advisors. Ettl also has the authority to put "rush" repair orders for special customers ahead of others. However, Ettl has no authority to reprimand employees. Furthermore, Ettl has no authority to hire or fire employees nor to effectively recommend such action. He has no authority to recommend raises or to adjust grievances and has done none of these things. He reports to Willard Jewel who has the authority to take the action listed above. Ettl has no office and spends almost all of his time on the shop floor working with the other mechanics.

Robert Ettl is paid a weekly salary plus a 1-percent bonus based on the monthly gross profit in the Cadillac service department, whereas the mechanics are paid on a hourly flat rate basis with a weekly guarantee plus a 5-percent retroactive bonus if productive labor reached 45 hours or more.[7] A review of the 1980 payroll records for Ettl, the six Cadillac mechanics, and the Cadillac service advisor reveals that their gross pay ranged from $15,000 to $21,000 while Ettl earned $18,734. He earned from $2000 to $6000 more than four mechanics and the service advisor, the same as one mechanic and $2500 less than another mechanic. Ettl's benefits are the same as the other mechanics with the exception that he is supplied with a company vehicle (1977 Chevrolet Monte Carlo) because he has worked for the Company for 30 years. Ettl has the use of this automobile when it is not out on loan to customers. He is otherwise allowed to use this car to assure that it is in good working order.

Ronald Kehs, front-end mechanic, testified that Ettl was his foreman and he reported to him; however, when Ettl could not handle a problem he took it to someone above him. Kehs further testified that Ettl brought him repair orders, told him how to arrange his work, and told him which job would be next. However, Kehs testified that he went to Willard Jewel to get permission for vacation time and Jewel told him to tell Ettl when he would be on vacation.

Ronald Kehs testified with respect to Robert Ettl's duties as follows:

> A. It was more or less a chain of command. He was first in line and he took it to someone above him if he couldn't handle it.

Kehs further testified:

> A. In 1980 Robert Ettl was the foreman. If we had any service problems, we would go to Bob. If he couldn't handle it, he would go to Willard himself.
>
> Q. Relating to service problems?
>
> A. Right.

Daniel Kuhns, Cadillac mechanic, testified that Ettl wore street clothes and had no tools in the shop. He further testified that Ettl did not assign work in January 1980. He generally described Ettl's duties as road-testing cars, helping the other mechanics diagnose problems, helping the mechanics work on cars, helping the service writers, and talking to customers.

Wilbur Kunkle, Cadillac mechanic, testified that the service writers assigned him work, not Robert Ettl. He further stated that he asked Willard Jewel about time off for vacation.

William Lewers, Cadillac service advisor, testified that Willard Jewel was his supervisor. He stated that he did not know whether Ettl had tools in the shop or not. He further testified that Ettl distributed work orders to the mechanics; however, Lewers also had the authority to distribute work orders. He finally stated that it was a routine or normal function for Ettl to put a special customer ahead of another customer and to assign the first available mechanic to that customer.

Richard Falise testified that Willard Jewel supervised the Cadillac mechanics and was available on the shop floor several times a day to answer any problems that the mechanics might have.

After reviewing all of the evidence, I find that the General Counsel has not proved by a preponderance of the evidence that Robert Ettl is a supervisor within the meaning of the Act. It is undisputed that Ettl could not hire or fire or effectively recommend such action. Further, it is undisputed that he had no authority to discipline employees or resolve their grievances or to effectively recommend such action. The evidence offered by the General Counsel indicates that at most Ettl could routinely assign work based on his experience and expertise. Ettl also could resolve service-related problems which he was expected to do because of his special qualifications. His salary and bonus in my opinion is not so unique as to confer supervisory status. Nor does his title confer any special status in light of his duties which by all accounts consisted largely of working on vehicles, assisting mechanics, diagnosing problems, and road-testing cars. The General Counsel argues that at the meeting on Janaury 23 Falise distributed an organization chart which informed the Cadillac mechanics as to who they should take their problems to; in this case, Ettl. However, the evidence supports a finding that this meeting was held a week after the Union's demand and was a temporary measure caused by the hospitalization of Willard Jewel 2 or 3 days prior to the meeting. Thus, I have accorded little or no weight to this evidence in making my finding. Accordingly, I find that Robert Ettl is not a supervisor and should be included in the stipulated unit.

[7] Service advisors are also paid a salary plus a bonus based on 4 percent of monthly sales of parts and labor. Drissel receives a 3-1/2 percent bonus based on monthly gross profits. Perna is paid a 1-percent bonus based on monthly gross sales. Frankenfield receives a 2-1/2 percent bonus based on the monthly gross profit of Cadillac parts sales. Frank Reichl receives a 5-percent bonus based on monthly gross profit in the body shop.

h. *BMW Service Manager (David Drissel)*

The General Counsel contends that David Drissel is a supervisor within the meaning of the Act and should be excluded from the unit, while the Respondent contends that he is, at most, a technical lead mechanic who should be included in the unit as an employee.

The Respondent's witnesses testified that Drissel is designated a service manager because of BMW requirements. They further testified that because of a BMW requirement that its parts not be mixed with Cadillac parts, the dealership is required to have a separate operation for BMW automobiles. Without this requirement, there would be only one service department. Drissel is located in the BMW service department, along with three other BMW mechanics, which is located in the basement of the Respondent's facility. He has no office; however, he has a standup desk on the shop floor where he spends 50 percent of his time writing service orders for customers, inserting warranty claim code numbers, and insuring that they are punched on the back of the ticket. Another 20 percent of Drissel's time is spent helping mechanics diagnose problems. He keeps his tools in the shop and approximately 30 percent of his time is spent actually "turning wrenches."

Drissel works with three other mechanics and has no authority to hire or fire them or any other employees. He has not done so in the past, nor does he have authority to effectively recommend the hiring and firing of other employees. He does not recommend raises for anyone. Drissel has no authority to adjust employee grievances. Employees having problems must go to Willard Jewel who is in the shop every day. Drissel has no authority over the other BMW mechanics and does not discipline them for any reason. This authority lies in the hands of Willard Jewel. Drissel performs the work on automobiles that "come back" for repairs. He does not direct a mechanic to re-do the job or otherwise penalize him for any problems on "come-back" work. Drissel, however, has authority and does assign work (job orders) to other BMW mechanics.

Drissel has the same benefits as the other mechanics with the exception of the use of a company demonstrator which has to be available for customer use. He attends service meetings with other mechanics; however, he does not conduct any of these meetings.

Drissel was paid a salary of $18,000 in 1980 which included a bonus based on a percentage of sales. Other BMW mechanics earned approximately $17,000 and $18,000 for the same period. Drissel wears a uniform with a light blue shirt while the other mechanics wear dark blue shirts. According to the Respondent, this was done in order to let customers know who to go to to have their service order written up.

Michael Dalton, BMW mechanic, testified that when he was hired he was told that Drissel was a senior service technician. However, shortly thereafter, Drissel assumed the position of service manager and Dalton considered him to be his boss. Dalton further testified that Drissel assigned work to him and that he took his problems to Drissel. These problems related to special tools that were needed in the shop and problems concerning a draft coming into the shop. Richard Cole, another BMW mechanic, testified that he considered Drissel to be his supervisor and that Drissel assigned work to him.

As in the case of Robert Ettl, I find that the General Counsel has not established by a preponderance of the evidence that David Drissel was a supervisor during the critical time herein. While it was established that Drissel assigned work to employees and listened to employee problems, there was no evidence offered to rebut the Respondent's evidence that Drissel's work assignments were routine in nature and similar to those made by service advisors. Furthermore, no evidence was offered to show that Drissel exercised any independent judgment or that his decisions were based on anything other than his experience and knowledge. Moreover, there was no evidence offered by the General Counsel that Drissel ever adjusted any employee grievances. All the record reflects is that he listened to some employee problems. While it is true that Drissel had the title of manager, and received a bonus, I do not consider these factors as controlling, especially since he spent almost all of his time writing service orders and working with his hands. Also to be noted is that he earned approximately the same wages as the other mechanics. Of equal significance is the unrefuted testimony that Drissel had no authority to hire, discharge, grant wage increases, and adjust grievances or to effectively recommend such actions. Although two employees testified that they thought Drissel was their boss, there is very little evidence to show why they considered him to be their supervisor. There is no evidence that they were told this by management. Therefore, I conclude that they made this assumption based on Drissel's routine assignments to them and his listening to their problems on occasion. This is not sufficient in my opinion to confer supervisory status. Therefore, I find that the General Counsel has not sustained his burden of proving that David Drissel was a supervisor within the meaning of the Act. Accordingly, I find that Drissel should be included in the unit stipulated by the parties.

i. *Body Shop Manager (Frank Reichl)*

Frank Reichl who was designated as body shop manager works in the body shop which is located in a separate building approximately 10 feet away from the BMW shop. In January six other employees worked in the body shop: four body shop mechanics, a helper, and an apprentice. According to the Respondent's witnesses Riechl is no more than a service advisor who issues work orders to the body shop mechanics on a first-come-first-served basis. There is no discretion involved as to who gets what job and, if there is a disagreement between the employees concerning a particular job, Willard Jewel is notified. Riechl is responsible for working up estimates on customer automobiles and greeting customers. He spends approximately 10 percent of his time doing service writing and the rest of his time is spent physically working on cars and helping the other body shop employees. He has tools in the shop and spends approximately 50 percent of his time doing body work or painting. He also picks up automobile parts and washes cars.

In carrying out his duties, Reichl has no authority to transfer employees from one job to another or to hire and fire other employees, or to recommend such action. He never recommended that anyone receive a raise nor had he ever recommended any other change in employee status. If employees had problems or gripes they were to go to Willard Jewel. Several body shop employees had gone to Willard Jewel's office from time to time. Reichl has no authority to adjust grievances. Reichl attends service meetings with the other mechanics. His benefits are the same as those received by other mechanics and he wears a uniform like the other mechanics with the only difference being a white instead of blue shirt with the word "foreman" on it.

Reichl is paid a salary plus a 5-percent bonus based on gross profits of the body shop, while the mechanics are paid a flat base rate on an hourly basis. Service advisors receive a salary plus a 4-percent bonus based on parts and labor sales. In 1980 Reichl's salary was more than two body shop mechanics but less than two other mechanics. Glenn Koehler earned approximately $19,500, John Persley earned $21,000, while Reichl earned approximately $18,000. Donald Cole, another body shop mechanic, earned $15,500 and Kermit Krause earned $11,315.

Donald Cole, a body shop employee, testified that Reichl was his supervisor because he gave him work orders. He further testified that he took his work-related problems such as how to accomplish the work on an automobile to Frank Reichl. With respect to grievances concerning working conditions, Cole testified that he took his small problems to Reichl and all the other grievances to Jewel. Although Cole stated that he would tell Reichl if he were going to be late or leaving early, he also testified that he would merely inform Reichl and not ask his permission. Cole further stated that he took a problem concerning a "cold draft" in the shop to Reichl; however, Reichl never did anything about the problem, causing him to go to Jewel and Falise. Cole also inquired about a raise to Reichl; however, Reichl told him that he did not have any authority to give raises. Although Cole testified that he was told that he would be working under Reichl when he was hired, there was evidence that Cole was hired as Reichl's helper. According to Cole, Reichl spent approximately 20 percent of his time working in the shop on cars and the remainder writing estimates, doing paper work, making appointments, handing out work, and seeing that the jobs were done correctly.

Body shop employee Truman Webb testified that Jewel told him at a meeting in the body shop that Reichl was his boss. According to Webb, this conversation took place in early 1980. Jewel confirmed that such a meeting occurred shortly before he went into the hospital for surgery. He testified that he held a meeting with the body shop employees because he was uncertain as to the amount of time that he would be away from his job. It was therefore necessary to make a temporary change in responsibility, and he told each body shop employee to respect Frank Reichl as a superior while he was gone.

Body shop helper Wayne Kerstetter testified that he would call Reichl in the event he was going to be absent on a particular day, but that he would simply tell him he would not be in, and Reichl would say, "Okay." He also testified that it was necessary to talk to Willard Jewel about vacations. If he wanted to work overtime, he would check with Frank Reichl who on some occasions would give him permission and on other occasions would have to check with Willard Jewel before granting permission.

The General Counsel presented very little probative evidence that Reichl possessed supervisory authority. The picture that emerges from all the testimony is that Reichl assigned work orders to mechanics on a routine basis and spent the bulk of his time writing service orders and performing body and paint work on customer's automobiles. Although the body shop is physically separated from the dealership facility, the evidence indicates that easy access is possible through connecting doors and that body shop employees were accustomed to taking their grievances to Willard Jewel; thus indicating that Reichl had no authority to resolve them. The unrefuted evidence presented by the Respondent is that Reichl at the critical time in question (prior to January 17) had no authority to hire, discharge, grant wage increases, adjust grievances, or to effectively recommend such action. While he is paid a salary, as opposed to a flat hourly rate like other mechanics, his earnings were not sufficient to indicate that the Respondent had conferred supervisory responsibility or authority on him.

The General Counsel argues that if Reichl and Drissel are not found to be supervisors, it would leave Willard Jewel in charge of 45 employees which is a disproportionate ratio of supervisors to employees. However, assuming that 45 employees are in the unit, which is contrary to the General Counsel's position, the evidence indicates that Jewel supervises 28 employees (parts employees, body shop mechanics, Cadillac shop mechanics, BMW mechanics, car porters, and the service advisor) while Falise supervises 13 employees (janitors, office clericals, warranty clerk, and service cashier). The four new- and used-car get-ready employees are supervised by the new- and used-car managers. Thus, it appears that the ratio of 28 employees to 1 supervisor is not out of line considering the high experience level of the mechanics (18 years average experience) and the fact that there are experienced and highly trained lead mechanics in the various departments who help resolve work-related problems.

Accordingly, I find that the General Counsel has not carried his burden of proving that Reichl was a supervisor prior to January 17 and I will therefore include him in the unit.

j. *Cadillac parts manager (Robert Frankenfield) and BMW parts manager (Alfred Perna)*

The General Counsel contends that Robert Frankenfield is a supervisor and that Alfed Perna lacks a community of interest with the service and parts employees and that both should be excluded from the unit. The Respondent contends that Frankenfield is an employee and that Alfred Perna shares a community of interest with

the service and parts employees and both should be included in the unit.

Robert Frankenfield, Cadillac parts manager, works in the Cadillac parts department which is located next to the cashier's booth on the first floor of the Cadillac service area. The parts department, cashier's office, and service counter are all in one area with a counter which separates it from the shop. Robert Frankenfield spends 95 percent of his time receiving and stocking parts on the shelves, and dispensing parts to mechanics and customers who come to the parts counter. The other 5 percent of his time is spent at the teletype machine and ordering parts within the framework of preestablished guidelines. The dealership has a rule of maintaining a parts inventory of 2.5 to 3 percent of sales. Frankenfield makes no decisions other than the routine ordering of parts and any decisions involving something out of the ordinary are made by the Service and Parts Manager Willard Jewel or General Manager Richard Falise. Frankenfield has no authority to hire and discharge other employees or to recommend such action, and he has never done so in the past. He has no authority to recommend that anyone be reprimanded and has never done so. Frankenfield has no authority to adjust employee grievances which authority lies exclusively with Willard Jewel. He has no authority to set lunch periods and he and his helper agree among themselves as to what time they go to lunch. Frankenfield has a helper, Russell Anspach, who assists Frankenfield in receiving and unloading parts and stocking them on the shelves. In performing these duties, Frankenfield directs Anspach's work by telling him how to do these jobs and where to stock the various parts. According to the Respondent's witnesses, the relationship between Frankenfield and his helper is the same as the relationship between the mechanics and their helpers. Anspach testified that he assumed that Frankenfield was his boss because he was the parts manager. He further testified that Frankenfield once in a while asked him why he was late. If Anspach ever wanted time off, he would go to Frankenfield, but Frankenfield would in turn ask Jewel. Anspach testified that he asked Frankenfield for a raise which was later granted but that he did not know how this was accomplished since he also asked Jewel for a raise. Frankenfield is labeled as parts manager because the dealership is required to have someone in that position by the factory. Willard Jewel is responsible for all parts and service. If there are any decisions in the parts department requiring discretion and independent judgment, Jewel makes them. Frankenfield is paid a weekly salary plus a monthly commission based on 2.5 percent of the gross profit on parts sold. However, his total compensation is approximately 25 percent less than the average mechanics. Frankenfield earned $15,800 during 1980 while mechanic Ronald Kehs received $12,340. Wilburt Kunkle, another mechanic, earned $18,000, Richard Cole earned $17,912, and Michael Dalton earned $17,221. Frankenfield has attended some management meetings. The service writers who have been included in the unit have also attended these meetings. However, Frankenfield does not attend top management meetings where corporate policy is set. Frankenfield has the same benefits as the mechanics and other parts and service personnel. He wears a uniform consisting of a white shirt and blue pants similar to that worn by the service advisors. All the other parts and service personnel also wear uniforms.

Alfred Perna is the BMW parts manager and the sole employee in the BMW parts department located in the basement of the Respondent's facility. He has no helper or anyone else working with him. Perna spends all of his time stocking and issuing parts to mechanics and customers. He is under the supervision of Willard Jewel, the same as other parts and service personnel. Perna has no authority to hire and fire other employees or to effectively recommend such action. He has no authority to recommend raises or other personnel changes and has not done so in the past. His total compensation is approximately 25 to 30 percent less than that of the mechanics. He receives the same benefits as the other parts and service employees and attends service meetings with them.

The evidence establishes that neither Frankenfield nor Perna is a supervisor within the meaning of the Act. At most, Frankenfield issues routine instructions to his helper which does not require him to exercise any independent judgment. The judgment exercised by Frankenfield appears to be nothing more than that normally exercised by a worker experienced in his job. *Grimaldi Buick-Opel, Inc.*, 202 NLRB 436 (1973). It is equally obvious that Frankenfield shares a close community of interest with the mechanics and since the parties agreed to include parts department employees in the unit, I conclude that Frankenfield should be included in the unit since he is not a supervisor, and works in the same area with the mechanics, having close daily contact with them. He also receives the same benefits and is under the same supervision.

Alfred Perna is clearly not a supervisor since he has no employees to supervise. I further find that Perna shares a community of interest with the mechanics and should be included in the unit which includes parts employees by agreement of the parties.

Accordingly, I find that Alfred Perna and Robert Frankenfield should be included in the unit.

2. Authorization cards and demand

It is admitted that on January 17 union representatives met with the Respondent's manager and requested recognition in a unit of all service and parts employees. The evidence is also undisputed that, at the time of the Union's demand, it had 17 signed authorization cards, none of which had been withdrawn. Each of the cards was authenticated by the signer, and was received into evidence without objection. The union authorization cards in unambiguous language indicated that the signers authorized the Union to represent them for the purposes of collective bargaining. The Respondent, in its brief, argues that the cards cannot be used for the purpose of establishing the existence of majority support because the employees were told by the union representatives that if they signed a card the Union would pay their salary in the event they got fired, went on strike, or were laid off. Thus the Union was implying that if employees did not

sign a card, they would lose their job, get laid off, or go out on strike. The Respondent argues that the cards were obtained through the use of coercion and unlawful promises of benefits. I find that the Respondent's argument is not supported by the evidence. The evidence is overwhelming that employees were told by the Union that, if they signed a union card and were later discharged because of their union activities or went on strike, the Union would stand behind them or support them and pay their wages. I find nothing coercive in this statement nor do I find an unlawful promise of benefit. *Staats & Staats, Inc.*, 254 NLRB 888 (1981).

Accordingly, I find that the Union had 17 valid signed and dated union authorization cards at the time demand was made on the Respondent.

3. Union's majority status

The parties stipulated that a unit appropriate for purposes of collective bargaining is:

> All service and parts department employees employed at the employer's Allentown, Pennsylvania automobile dealership facility, excluding office clerical employees, car salesmen, guards and supervisors as defined in the Act.

The parties further stipulated that the unit should include 24 employees with the following job classification: mechanics, Cadillac parts assistant, new car get-ready employees, used-car get-ready employees, apprentices, helpers, warranty clerk, service cashier, and service advisor. The parties were in dispute over 21 employees with the following job classifications: Janitors (8), car porters (4), service clerks (2), telephone operator (1), BMW service manager (1), Cadillac shop foreman (1), Cadillac parts manager (1), BMW parts manager (1), used-car get-ready employees (1), and body shop manager (1). Of these 21 employees in dispute, I have included 7 janitors, BMW service manager, Cadillac shop foreman, Cadillac and BMW parts managers, body shop manager, and used-car get-ready employee in the unit. Thus the unit had 37 employees on the date of the Union's demand. I excluded eight employees from the unit: one janitor, four car porters, two service clerks, and one telephone operator.

Accordingly, on the date of the demand, the Union represented 17 of 37 unit employees and did not represent a majority either then or any other time material herein.

4. Applicability of a bargaining order

Having found that at no time material herein did the Union represent a majority of the Respondent's employees in the stipulated unit, I will not recommend the imposition of a bargaining order.

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Amalgamated Local Union 355 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent interfered with, coerced, and restrained its employees in the exercise of the rights guaranteed them by Section 7 of the Act, thereby committing unfair labor practices prohibited by Section 8(a)(1) of the Act, by:

(a) Coercively interrogating an employee concerning his and other employees' union activities and sympathies.

(b) Soliciting grievances from employees to persuade them to abandon the Union.

(c) Promising an employee increased benefits in order to persuade him to abandon the Union.

(d) Soliciting employees to withdraw their union authorization cards.

4. All service and parts department employees employed at the Employer's Allentown, Pennsylvania automobile dealership facility, excluding office clerical employees, car salesmen, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. The Union did not represent a majority of the employees in the above appropriate unit on January 17, 1980.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Except as found above, the Respondent has not engaged in other unfair labor practices as alleged.

THE REMEDY

Having found that the Company has engaged in and is engaging in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take affirmative action necessary to effectuate the purposes of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Daniels Cadillac, Inc., Allentown, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees concerning their or other employees' union activities and sympathies.

(b) Soliciting grievances from employees to persuade them to abandon the Union.

(c) Promising employees increased benefits in order to persuade them to abandon the Union.

(d) Soliciting employees to withdraw their union authorization cards.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under the Act.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Post at its Allentown, Pennsylvania facility copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 4, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps have been taken to comply.

[9] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

The Act gives employees these rights.

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT coercively interrogate employees concerning their and other employees' union activities and sympathies.

WE WILL NOT solicit grievances from employees to persuade them to abandon the Union.

WE WILL NOT promise employees increased benefits in order to persuade them to abandon the Union.

WE WILL NOT solicit employees to withdraw their union authorization cards.

DANIELS CADILLAC, INC.